

BARBARA A. STEIN
Claimant

WAL-MART

Respondent

AND

CLAIMS MANAGEMENT INC.
Insurance Carrier

Docket No. 247,743

Claimant appealed Administrative Law Judge Nelsonna Potts Barnes's Award dated April 15, 2002. The Board heard oral argument on October 18, 2002.

James B. Zongker of Wichita, Kansas, appeared for the claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

The Board has considered the record and adopted the stipulations listed in the Award.

The Administrative Law Judge (ALJ) found claimant injured her right upper extremity, including her shoulder, while working for the respondent. The ALJ awarded claimant a 15 percent permanent partial disability for a scheduled right shoulder injury. Claimant requested review and argues, in addition to the right shoulder injury, she also suffered injury to her neck. Accordingly, claimant requests the Board to award her permanent partial general body disability benefits instead of benefits for a scheduled shoulder injury.

Conversely, respondent contends the ALJ's Award that limited claimant to a scheduled injury was correct and should be affirmed. Respondent asserts the claimant only proved her right shoulder injury was caused by her work activities. Respondent argues claimant failed to prove her work activities either caused or aggravated claimant's neck pain.

At the time of the regular hearing, claimant was still employed by respondent and was earning more than her preinjury gross average weekly wage. Therefore, work disability is not an issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered an injury at work on April 17, 1999, while lifting a bucket of ice to fill an ice machine. Claimant felt her shoulder snap and experienced pain in the front of her shoulder as well as in her neck.

Claimant was initially treated by Dr. David W. Niederee and received some physical therapy and anti-inflammatory medication. Claimant was then referred for treatment with Dr. Robert L. Eyster. Dr. Eyster began a protracted course of treatment which extended into March 2002. Dr. Eyster initially diagnosed possible rotator cuff impingement and later added a diagnosis of cervical strain. The doctor provided claimant with treatment modalities consisting of injections, physical therapy, cervical traction, anti-inflammatory medications, muscle relaxants, a TENS unit and analgesics.

Claimant complained of neck pain at her August 4, 1999, appointment with Dr. Eyster and the doctor recommended therapy for the neck, including traction. On August 25, 1999, Dr. Eyster diagnosed cervical strain as well as rotator cuff tendinitis. Dr. Eyster continued to provide conservative treatment for the claimant's cervical and shoulder complaints and in November 1999 ordered an MRI of claimant's cervical spine. Although the MRI did not reveal a herniated disc of the neck, it did reveal mild degenerative disc changes at C4-5 and C5-6.

Claimant was examined by Dr. Pedro A. Murati on November 8, 1999, at her attorney's request. Dr. Murati diagnosed right shoulder and neck pain with signs and symptoms of radiculopathy and recommended additional testing for the cervical spine and upper extremity. Dr. Murati rated the claimant's right shoulder at 6 percent and her cervical strain 4 percent and her loss of range of motion of the cervical spine at 8 percent. The ratings combined for a 16 percent general body impairment.

Claimant continued to treat with Dr. Eyster for her ongoing complaints of cervical and shoulder pain. The complaints remained unchanged and claimant continued to see Dr. Eyster on a regular basis for continuing treatment.

The ALJ ordered an independent medical examination be performed by Dr. C. Reiff Brown. Dr. Brown examined the claimant on October 11, 2000. Dr. Brown diagnosed claimant with rotator cuff sprain and tendonitis in the right shoulder. In addressing claimant's cervical complaints, Dr. Brown noted: "It is common in patients with rotator cuff tendonitis, adhesive capsulitis and other chronic shoulder problems to have tightness that extends from the shoulder musculature into the upper trapezius and low cervical paraspinals in a manner that restricts movement of the neck and causes some discomfort in those tight muscles on stretching the neck into certain positions." Dr. Brown limited his impairment rating to a 15 permanent partial impairment of function of the right upper extremity.

Claimant continued to receive treatment from Dr. Eyster for both her neck and shoulder complaints. On August 29, 2001, Dr. Eyster performed an arthroscopic distal clavicle resection and decompression of claimant's right shoulder. In the follow-up treatments, Dr. Eyster continued to diagnose claimant with chronic neck trapezius muscular strain. At her last visit with Dr. Eyster on March 4, 2002, the doctor gave claimant a trigger point injection of the neck.

On January 7, 2002, claimant was again examined by Dr. Murati at her attorney's request. Dr. Murati diagnosed claimant with right shoulder pain status post rotator cuff repair, distal clavicle resection and decompression as well as myofascial pain syndrome affecting the right shoulder and cervical spine. Dr. Murati rated claimant's right shoulder at 10 percent for the distal clavicle resection, 10 percent for the decompression and 5 percent for the loss of range of motion. The upper extremity impairments combined for a 23 percent impairment which converted to a 14 percent whole body impairment. Dr. Murati rated claimant at 4 percent for the myofascial pain affecting the cervical spine and 1 percent for the loss of range of motion of the cervical spine. Using the combined values chart, Dr. Murati concluded claimant had a 19 percent whole body functional impairment.¹

On January 14, 2002, Dr. Eyster had initially assigned claimant a 2 percent impairment for chronic neck and shoulder symptomatology.² Dr. Eyster later testified that if he had to be specific the 2 percent rating would be to the shoulder for the rotator cuff impingement. Dr. Eyster admitted his rating was not based upon the American Medical

¹ Utilizing the Combined Values Chart of the *AMA Guides*, 4th Edition, a 14 percent and 5 percent combine for an 18 percent impairment.

² Eyster Depo., Ex 2.

Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides).³ Lastly, Dr. Eyster agreed that if the AMA *Guides* contained a rating for a distal clavicle resection, he would adopt that percentage in lieu of his rating.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁵

The claimant noted at the regular hearing that she was still working for respondent and was earning more than when she was injured. As a result she was not seeking a work disability and was only seeking a functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides*. At the time of claimant’s injury, the Act required that functional impairment be based on the fourth edition of those *Guides*.⁶

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁷

The claimant complained of and received medical treatment for neck pain for an extended period of time after her work-related injury. The treatment modalities directed at the claimant’s cervical complaints included medications, physical therapy including cervical traction, and injections. Although claimant experienced some temporary relief from time to time over her extended three year period of treatment, nonetheless, her complaints remained consistent.

When the court ordered an independent medical examination to be performed by Dr. Brown, claimant still had cervical and shoulder complaints but she had not yet had the surgery to her shoulder. Dr. Brown did not provide a rating for claimant’s neck complaints but did note the claimant’s shoulder problem could result in referred pain to the neck. After the independent medical examination, claimant continued to receive treatment for her

³ Eyster Depo. at 20.

⁴ K.S.A. 44-501(a).

⁵ K.S.A. 44-508(g).

⁶ K.S.A. 44-510e(a).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

shoulder which included surgery almost a year after Dr. Brown's examination. In addition, claimant continued to receive treatment for her neck pain.

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.⁸ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁹

Although Dr. Brown, the court ordered independent medical examiner, concluded claimant did not suffer permanent impairment to her neck, nonetheless, he noted the shoulder problem claimant was experiencing could result in referred pain to her neck. Claimant consistently complained of and received treatment for her neck in addition to her shoulder. In this case the injury was to the shoulder but it manifested itself by disability not only in the shoulder but also in the neck.

Dr. Brown's court ordered independent medical examination was conducted approximately a year before claimant had the surgery to her right shoulder. In the intervening time period, the claimant continued to receive treatment for both her shoulder and her neck. Because of the subsequent surgery and treatment claimant received after Dr. Brown's examination, his rating provided before those events is accorded less weight. But his report is instructive regarding the source of claimant's neck pain as being referred from her shoulder injury.

Dr. Eyster admitted he did not utilize the AMA *Guides* as required and accordingly his rating cannot be considered.¹⁰ Moreover, Dr. Eyster provided treatment for the claimant's neck complaints, which he described as chronic, for approximately three years. The Board is not persuaded by his opinion that claimant did not suffer any permanent impairment to her neck. The second rating performed by Dr. Murati was based on an examination of the claimant conducted not only after the shoulder surgery, but also after claimant's follow-up treatment with Dr. Eyster. As a result the Board concludes the opinions expressed by Dr. Murati are, in this case, the most persuasive and are adopted.

Dr. Murati converted his ratings for the shoulder to a 14 percent impairment of the whole body. Dr. Murati rated the claimant's cervical condition at 5 percent. As previously footnoted, the combined values chart combines the two for an 18 percent. The Board concludes claimant has met her burden of proof to establish she suffered an 18 percent permanent partial general body disability as a result of her April 17, 1999, work-related accident.

⁸ K.S.A. 44-510d; K.S.A. 44-510e.

⁹ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

¹⁰ K.S.A. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 15, 2002, is modified to reflect claimant suffered an 18 percent permanent partial disability to the whole body.

The claimant is entitled to 74.70 weeks at \$190.32 per week or \$14,216.90 for an 18 percent permanent partial general bodily disability making a total award of \$14,216.90 which is all due and owing less amounts previously paid.

The award is affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation